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**BAY AREA PAINTERS AND TAPERS**  
**7** PENSION TRUST FUNDS, et al.

8

UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11

12 BAY AREA PAINTERS AND TAPERS  
PENSION TRUST FUNDS, DISTRICT  
COUNCIL 16 NORTHERN CALIFORNIA  
13 HEALTH AND WELFARE TRUST FUND,  
DISTRICT COUNCIL 16 NORTHERN  
CALIFORNIA APPRENTICE AND  
14 JOURNEYMAN TRAINING TRUST FUND,  
and THE JOINT BOARDS OF TRUSTEES;  
15 LES PROTEAU, CHARLES DEL MONTE,  
and DOUG CHRISTOPHER, AS TRUSTEES;  
16 and DISTRICT COUNCIL 16 OF THE  
INTERNATIONAL UNION OF PAINTERS  
17 AND ALLIED TRADES;

Case No.: C07-6344 MHP

## **AMENDED COMPLAINT**

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Plaintiffs,  
v.

21

**22** RODEO DRYWALL, INC., a California Corporation, and TONY RODRIGUEZ, Individually,

### Defendants.

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## Parties

1. The Bay Area Painters and Tapers Pension Trust Funds which includes the Bay Area Painters and Tapers Pension Trust Fund – The Annuity Plan ("Pension and Annuity Fund");

**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1 District Council 16 Northern California Health and Welfare Fund ("Health Fund"), and District  
 2 Council 16 Northern California Apprentice and Journeyman Training Trust Fund ("Apprenticeship  
 3 Fund") are employee benefit plans as defined in the Employee Retirement Income Security Act of  
 4 1974 ("ERISA") §3(3), 29 U.S.C. §1002(3). The Joint Boards of Trustees ("Trustees") of said  
 5 funds are the named fiduciaries of the funds under ERISA §402(a), 29 U.S.C. §1002(a). Les  
 6 Proteau is a Chairman and Charles Del Monte is the Secretary of the Trustees and both are  
 7 fiduciaries of said funds. Doug Christopher is the Chairman of the District Council 16 Northern  
 8 California Apprentice and Journeyman Training Trust Fund.

9       1. The Health Fund was formerly Bay Area Painters and Tapers Health Fund prior to  
 10 its merger with other health and welfare trust funds effective January 1, 2008.

11       2. District Council 16 of the International Union of Painters and Allied Trades,  
 12 ("Union") is a labor organization as defined in § 2(5) of the National Labor Relations Act  
 13 ("NLRA"), 29 U.S.C. § 152(5).

14       3. RODEO DRYWALL, INC., and TONY RODRIGUEZ are employers by virtue of  
 15 ERISA §3(5), 29 U.S.C. §1002(5), and NLRA §2(2), 29 U.S.C. §152(2). They are referred to  
 16 herein as "Defendants."

17       4. The Pension and Annuity Fund, Health Fund, Apprenticeship Funds, and their  
 18 fiduciaries are herein referred to as "ERISA Plaintiffs."

19       5. Jurisdiction exists in this Court over the claims asserted by the ERISA Plaintiffs by  
 20 virtue of ERISA §502, 29 U.S.C. §1132, in that the ERISA Plaintiffs seek to enforce the  
 21 provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which  
 22 violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief  
 23 under ERISA.

24       6. Jurisdiction exists in this Court over all the claims by virtue of Labor Management  
 25 Relations Act ("LMRA") §301, 29 U.S.C. §185, in that the ERISA Plaintiffs seek to enforce the  
 26 terms and conditions of a collective bargaining agreement between the Defendant and the Union.

27       7. To the extent jurisdiction over any claim does not exist under ERISA or the  
 28 LMRA, supplemental jurisdiction exists in this Court over such claims by virtue of 29 U.S.C.

**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1 §1367 in that they arise out of a common nucleus of operative facts that form the basis of the  
2 federal claims asserted herein, each of which has a substantial ground in federal jurisdiction.

## Venue

4       8.     Venue exists in this Court with respect to the claims under ERISA §502 because all  
5 of the plans of the ERISA Plaintiffs are administered within this district and the breach took place  
6 in this district.

7        9.      Venue exists in this Court with respect to the claims under LMRA §301(a) because  
8 this Court has jurisdiction over the parties, as the Union maintains its principal place of business in  
9 this district, its duly authorized officers or agents are engaged in representing employee members  
10 in this district, and the claims arose in this district.

## Intradistrict Assignment

12        10. The basis for assignment of this action to this court's Oakland Division is that all of  
13 the events and omissions giving rise to the ERISA Plaintiffs' claims occurred in the County of  
14 Alameda, where the ERISA Plaintiffs' funds and union dues, were administered during the period  
15 claimed herein, and where Defendant failed to fulfill its statutory and contractual obligations to the  
16 ERISA Plaintiffs.

## Bargaining Agreement

18        11. The Union and Defendant entered into a collective bargaining agreement  
19 ("Bargaining Agreement") requiring the payment of dues to the Union, and contributions to be  
20 made to the ERISA Plaintiffs and other funds more fully described under Schedule A of the  
21 Bargaining Agreement. The ERISA Plaintiffs are third party beneficiaries of the Bargaining  
22 Agreement.

23           12. The Trustees are the assignees of monies due under the Bargaining Agreement for  
24 the Work Preservation Fund, a California non-profit organization; the Painters & Allied Trades  
25 Labor Management Cooperation Initiative; and the Administrative Fund (collectively the  
26 "Funds").

27        13. Defendant has a statutory duty to make timely required payments to the ERISA  
28 Plaintiffs under ERISA §515, 29 U.S.C. §1145.

**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1       14. Under the terms of the Bargaining Agreement and of the governing documents of  
2 the ERISA Plaintiffs and the Funds which documents are incorporated into the Bargaining  
3 Agreement and made binding on Defendant, Defendant is required to submit monthly reports of  
4 hours worked by its employees, and to regularly pay to the ERISA Plaintiffs, the Funds, and to the  
5 Union for union dues, certain sums of money, the amounts of which are determined by the hours  
6 worked by employees of Defendant, as more fully set forth in the Bargaining Agreement. Under  
7 the terms of the Bargaining Agreement and the governing documents of the ERISA Plaintiffs and  
8 the Funds, Defendant agreed to pay liquidated damages for each delinquent payment. Defendant  
9 further agreed to pay interest on the combined total of contributions plus liquidated damages at the  
10 rates set by the Bargaining Agreement, from the day immediately following the date that each  
11 such payment became due until paid in full.

12        15. Under the terms of said Bargaining Agreement and of the governing documents of  
13 the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made  
14 binding on defendants, defendants are required to permit an authorized Trust Fund representative  
15 to examine such records of defendants as is necessary to determine whether defendants have made  
16 full payment of all sums owed to the Plaintiffs, all as more fully set forth in said governing  
17 documents, as amended, and incorporated into the Bargaining Agreement.

## Facts

16. Defendants have failed to submit reports or pay contributions owing to the  
plaintiffs under the Bargaining Agreement for work performed by defendants' employees during  
the months of July 2007 through September 2007, and have failed to pay liquidated damages and  
interest owing to the plaintiffs under the Bargaining Agreement for unpaid contributions.

23        17. On several occasions, demand was made on defendants on behalf of plaintiffs, for  
24 payment of all delinquent contributions, liquidated damages and interest due to the ERISA  
25 Plaintiff Funds, the Union, and the Funds. Defendants have failed and refused to make payment  
26 of any amounts due claimed herein, as required by the Bargaining Agreement.

27        18. Pursuant to the terms of the Bargaining Agreement, as well as the Trust Agreement,  
28 defendants are required to provide records so that the plaintiffs' representative may conduct an

**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1 audit to confirm compliance with the obligations under both the Bargaining and Trust  
 2 Agreements. Plaintiffs are still missing contribution reports from defendants for the period from  
 3 July, 2007 – September, 2007. It has recently come to Plaintiffs' attention that the reports that  
 4 were submitted by defendants (for October, 2007 to the present) may not have been accurate and  
 5 that additional amounts are owed to the Trust Funds. Plaintiffs are in the process of attempting to  
 6 schedule an audit. Written demand has been made on defendants on behalf of plaintiffs, to  
 7 schedule an audit and provide records for examination pursuant to the terms of the Collective  
 8 Bargaining Agreements and the governing documents of the ERISA Plaintiffs for the period July  
 9 1, 2007 through date of inspection.

10       19. Defendants have thus far not provided records or permitted an authorized  
 11 representative of the Plaintiffs to examine defendants' records as are necessary to determine  
 12 whether defendants have made full payment of all sums owed to the plaintiffs for the period July  
 13 1, 2007 through date of inspection.

14       20. Under the terms of said Bargaining Agreement and of the governing documents of  
 15 the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made  
 16 binding on defendants, defendants are required to regularly pay to the ERISA Plaintiffs, the  
 17 Bargained Plans, and the Union for dues, certain sums of money, the amounts of which are  
 18 determined by the hours worked by employees of defendants, all as more fully set forth in said  
 19 Bargaining Agreement. Also under the terms of said Bargaining Agreement and the governing  
 20 documents of the ERISA Plaintiffs, defendants agreed to pay liquidated damages in the amount of  
 21 ten percent (10%) for each delinquent payment, together with interest thereon at the rates  
 22 reasonably set by the Trustees of the ERISA Plaintiffs, from the day immediately following the  
 23 date that each such payment became due, all as more fully set forth in said governing documents,  
 24 as amended, and incorporated into the Bargaining Agreement.

25       21. Defendants have a statutory duty to make the required payments timely to the  
 26 ERISA Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and by failing to make such timely  
 27 payments has violated the law.

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**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1       22. Defendants have a contractual duty under the Bargaining Agreement to timely  
 2 make the required contributions, liquidated damages and interest to the ERISA Plaintiffs and the  
 3 Funds, and to timely make the required payment of union dues to the Union. By failing to make  
 4 such timely payments as required, defendants have breached said duty.

5       23. Defendants' failure and refusal to timely submit the aforesaid reports and payments  
 6 as alleged herein was at all times, and still is, willful. Said refusal is unjustified and done with  
 7 malicious intent. Defendants' failure to timely make such payments in compliance with the  
 8 Bargaining Agreement has reduced the corpus of the ERISA Plaintiff funds and operating ability  
 9 of the Union, thereby impairing their ability to pay or provide benefits to members and  
 10 beneficiaries, and thereby causing harm to all ERISA Plaintiffs funds and to the Union.  
 11 Defendants' obligations pursuant to the Bargaining Agreement are continuing obligations;  
 12 defendants continue to breach said Bargaining Agreement by failing and refusing to timely pay  
 13 monies due thereunder to the Plaintiff Funds and the Union. Plaintiffs are informed and believe,  
 14 and therefore allege, that defendants will continue to willfully refuse to make said payments unless  
 15 ordered by this Court to comply.

16       24. Defendants' failure and refusal to provide records and to permit examination of its  
 17 records as alleged herein was at all times, and still is, willful. Defendants continue to breach said  
 18 Bargaining Agreement, and the governing documents of the ERISA Plaintiffs which documents  
 19 are incorporated into the Bargaining Agreement and made binding on defendants, by failing to  
 20 permit examination of its records as alleged. Said refusal is unjustified and done with malicious  
 21 intent.

22       25. Plaintiffs are without an adequate remedy at law and the ERISA Plaintiffs, the  
 23 Bargained Plans and the Union will suffer continuing and irreparable injury, loss and damage  
 24 unless defendants are ordered specifically to perform all obligations required on defendants' part  
 25 to be performed under ERISA, 29 U.S.C. §§ 1101-1381, the L.M.R.A., 29 U.S.C. §§ 141-197, the  
 26 Bargaining Agreement, and the governing documents of the ERISA Plaintiffs referred to therein;  
 27 is restrained from continuing to refuse to perform as required thereunder; is specifically ordered to  
 28 provide certain records and to permit examination of its records as alleged herein; and to pay all

**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1 contributions, liquidated damages and interest determined to be due plaintiffs following  
2 examination of defendant's records.

## Prayer

**4** WHEREFORE, Plaintiffs pray as follows:

**5** 1. For a judgment against defendants as follows:

6           a.       For unpaid contributions for hours worked during the period July 2007  
7 through September 2007, as specified above and thereafter through judgment, and as to any other  
8 amounts found due on audit;

(2) To the Union in accordance with the Bargaining Agreement.

12                   b.       Liquidated damages on late paid and unpaid contributions in an amount  
13 provided for under the Bargaining Agreement and governing documents of the Plaintiff Funds and  
14 with respect to the ERISA Plaintiffs, ERISA Section 502(g)(2)(c), 29 U.S.C. Section  
15 1132(g)(2)(c).

16 c. Interest on late paid and unpaid contributions, dues and liquidated damages  
17 which become a part of contributions under the terms of the Bargaining Agreement, at the rates set  
18 in accordance with the Bargaining Agreement, the governing documents of the Plaintiff Funds and  
19 the ERISA Section 502(g)(2)(B), 29 U.S.C. Section 1132(g)(2)(B), with respect to the ERISA  
20 Plaintiffs, and the applicable legal rate with respect to dues or where otherwise appropriate.

21        2. For an order requiring defendant to provide certain records and to submit to an  
22 audit of such records by a date certain for the period July 1, 2007 through date of inspection; and

**23**        3.      For judgment against defendants in favor of the ERISA Plaintiffs and the Union, in  
**24** an amount equal to:

25                   a. Any unpaid contributions, as determined by said audit of defendants'  
26 records for the period July 1, 2007 through date of inspection pursuant to ERISA § 502(g)(2)(A),  
27 29 U.S.C. § 1132(g)(2)(A);

(1) To the ERISA Plaintiffs, in accordance with ERISA Section 502(g)(2)(A), 29 U.S.C. Section 1132(g)(2)(A) and the Bargaining Agreement;

**3** (2) To the Union, in accordance with the Bargaining Agreement;

**4** b. Liquidated damages in an amount equal to the greater of:

**5** (1) Interest on the unpaid contributions, or

10 c. Interest on any unpaid contributions and dues, and on liquidated damages,  
11 at the rates and in accordance with the Bargaining Agreement, the governing documents of the  
12 ERISA Plaintiffs, ERISA Section 502(g)(2)(B), 29 U.S.C. Section 1132(g)(2)(B), with respect to  
13 the ERISA Plaintiffs, and the applicable legal rate with respect to dues and where otherwise  
14 appropriate.

15           4. For any additional contributions and dues payable to plaintiffs and the Bargained  
16 Plans as third party beneficiaries of the Bargaining Agreement at time of judgment, plus interest  
17 and liquidated damages as above provided and in accordance with the Bargaining Agreement, the  
18 governing documents of the ERISA Plaintiffs and, with respect to the ERISA Plaintiffs, ERISA  
19 Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).

20           5. ERISA Plaintiffs' reasonable attorneys' fees and costs of this action in accordance  
21 with ERISA § 502(g)(2)(D), 29 U.S.C. § 1132(g)(2)(D); and in accordance with the collective  
22 bargaining agreement for all Bargained Plans, and with LMRA Section 301, 29 U.S.C. § 185 for  
23 all plaintiffs.

24        6. For an order enjoining defendants from violating the terms of the Bargaining  
25 Agreement and the governing documents referred to therein, from disposing of any assets until  
26 said terms have been complied with, and from continuation or operation of defendants' business  
27 until said terms have been complied with.

**28** 7. That the Court retain jurisdiction of this case pending compliance with its orders.

**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**

1       8. For such other and further relief as the Court may deem just and proper.

2 Dated: July 1, 2008

SALTZMAN & JOHNSON  
LAW CORPORATION

4 By: \_\_\_\_\_/s/  
5 Michele R. Stafford  
6 Attorneys for Plaintiffs  
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**AMENDED COMPLAINT  
Case No.: C07-6344 MHP**